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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1095

RICHARD B. MENSEN,
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the Supreme Court of Illinois**

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BALTIMORE & OHIO RAILROAD COMPANY,
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## PETITION FOR A WRIT OF CERTIORARI

**To the Supreme Court of Illinois**

Now comes the Petitioner, Richard B. Mensen, by Leonard J. Dunn, of the Bar of this Court, and presents this, his Petition for Writ of Certiorari to the Supreme Court of Illinois, and respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois, in the cause entitled "Richard B. Mensen, Petitioner v. Baltimore & Ohio Railroad Company, Respondent", which final judgment denied Petitioner a review by the Supreme Court of Illinois of a decision of the Appellate Court of Illinois, Fifth District, in the cause in the last-named court entitled "Richard B. Mensen,

Plaintiff-Appellee v. Baltimore & Ohio Railroad Company, a Corporation, Defendant-Appellant". The decision of the Appellate Court reversed, without remandment, a prior judgment entered by the Circuit Court of St. Clair County, Illinois, in favor of the Petitioner, Richard B. Mensen, in the amount of $104,250.00.

## OPINIONS BELOW

The judgment of the Supreme Court of Illinois was not accompanied by an opinion.

The Appellate Court of Illinois filed a majority opinion and minority dissent thereto August 7, 1969. It is set forth as Appendix "A" to this Petition.

## JURISDICTION

The date of the judgment of the Supreme Court of Illinois sought to be reviewed is November 25, 1969. No rehearing was sought or ordered; no extension of time within which to seek certiorari was sought or ordered.

Jurisdiction of this Court is conferred by the provisions of United States Code, Title 28, § 1257 (3).

## QUESTIONS PRESENTED FOR REVIEW

The suit is one for damages under the Federal Employers' Liability Act, brought by Richard B. Mensen, a railway signal maintainer against his employer, the Baltimore & Ohio Railroad Company, a Corporation, for injuries sustained as the result of defective equipment furnished him, after requests for new and safer equipment had been made by him and denied by the employer, Baltimore & Ohio Railroad Company. The theory of liability that Mensen successfully presented in the trial court was that the employer, Baltimore & Ohio Railroad Company, provided, equipped and maintained its signal truck,

used and operated by Mensen, with defective or faulty tires or tubes and further, that said employer failed and refused to remove or permit replacement of defective and faulty tubes or tires when they knew or should have known that the same would subject Mensen to additional risk and hazard. A jury returned a verdict for Mensen, in the amount of $104,250.00.

The question presented for review is:

In such a case, can the Appellate Court, Fifth District of Illinois, set aside the verdict of the jury on the ground that the evidence failed to prove that the employer's negligence caused Mensen's injury, when the testimony in the record was that the tubes on the rear wheels of his signal maintainer's truck, were repeatedly tearing at the seams and were defective; that the condition required Mensen to repeatedly change truck tires in adverse weather conditions and in many places; that Mensen's request to his supervisor for new replacement tubes or tubeless tires was repeatedly rejected because the tire budget was low; that after Mensen's injury, which occurred when he was attempting to remove from the truck a tire with the defective tube in it, the supervisor told Mensen he was afraid something like this would happen; that eight days after Mensen's injury he was furnished the previously requested tubeless tires; that in the following six or more months, Mensen continued to work before becoming totally disabled, no additional breakdowns because of tire or tube failure occurred.

## STATUTE INVOLVED

The statute involved is U. S. C., Tit. 45, § 1, as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Terri-

tories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

## STATEMENT OF CASE

(Numerical references are to the page numbers of the abstract filed herein.)

Petitioner, Richard B. Mensen, age 40, a signal maintainer, with 22 years seniority with the Baltimore & Ohio Railroad Company, was furnished a truck by the em-

ployer for use in his work of going from signal to signal in his assigned territory. Truck log book records detailed that beginning April 5, 1963 and repeatedly thereafter, flat tires began occurring on said truck because of defectively manufactured inner tubes (Abs. 37, 38). Each flat tire necessitated a truck tire change by Mensen, increasing the risk of injury to Mensen, a hazard not otherwise customarily experienced in his usual duties.

The undisputed testimony of Mensen was that his seven written and oral requests for four new tubeless tires from his supervisor to replace the defective tubed tires on his truck, was rejected, but that shortly before February 3, 1965, the date of his injury, he was furnished two replacement tubeless tires and ordered to have them mounted on the front of the truck so as to prevent a highway accident (Abs. 40, 41, 47, 48). Additional tubeless tires or replacement tubes were refused Mensen before February 3, 1965 by his supervisor because "Well, my budget is just a little bit overrun right now. I will get them to you as soon as I can." The remaining two tubeless tires came on February 11, 1965, after Mensen had reported his injury, which occurred when attempting to remove a rear truck tire in extremely adverse weather conditions, which tire had gone flat because of the defective tube (Abs. 36, 38, 40).

When Mensen reported his injury to the supervisor, stating that the injury had occurred because of the previously reported defective tube, the supervisor commented "I was scared something like that might happen," (Abs. 41). After the injury, the remaining two tubeless tires were promptly furnished Mensen and no flats were encountered during the balance of 1965 which was the last year that Mensen had the physical ability to work. Mensen's present total permanent disability was related to the occurrence of February 3, 1965.

After entry of a verdict by the jury in Mensen's favor in the amount of $104,250.00, and the trial court's denial of post trial motions, the Baltimore & Ohio Railroad Company appealed to the Appellate Court of Illinois, Fifth District, which reversed, without remandment, the verdict and judgment in the trial court.

On August 7, 1969, the majority opinion filed by the Appellate Court of Illinois, stated in part:

> "We have examined the many cases cited by counsel and those collected in notes found at 98 A. L. R. 2d 653, 30 A. L. R. 2d 1192, and in the annotations to 45 U. S. C. A. 51. Any attempt at analysis, comparison, or reconciliation, would serve only to further confuse an already chaotic situation.
>
> In this case, assuming defendant was negligent in permitting a defective inner tube to remain on the truck, the evidence, in our opinion, fails to prove that its negligence caused plaintiff's injury. Nicholson v. Erie R. R., 253 F. 2d 939 (CA—2); Dessi v. Pennsylvania R. R., 251 F. 2d 149 (CA—3); Simpson v. Texas & New Orleans R. R., 297 F. 2d 660 (CA—5).
>
> The performance of his duties required plaintiff to maintain the truck, including the changing of tires. It is not contended that defendant failed to furnish him with the tools necessary to change the tire, and the most the evidence shows is that he may have been required to perform the particular task more often than if the tires were perfect, or that 'but for' defendant's negligence plaintiff would not have been injured.
>
> In a philosophic sense the existence of the flat tire may have played a part in producing plaintiff's injury in that had it not occurred, there might have been no occasion for changing the tire. What occurred here, however, could as well have happened while plaintiff was mounting a new tire furnished in

compliance with his request, or in a routine rotation or replacement of tires.

We have examined the record and hold that the evidence was insufficient to take to the jury the question of whether defendant's negligence played a part in causing plaintiff's injury."

A dissenting opinion stated, in part:

"In my opinion the judgment of the Circuit Court of St. Clair County in this case should be affirmed under the rationale of Gallick v. Baltimore and Ohio Railroad Company, 372 U. S. 108, 83 S. Ct. 659."

**Both the majority and dissenting opinions relied solely, for their position of affirmance or reversal, upon their understanding or opinion as to the meaning or rationale of the language of the U. S. Supreme Court in Gallick v. Baltimore and Ohio Railroad Company, 372 U. S. 108, 83 S. Ct. 659.**

Mensen thereafter filed his Petition praying leave to appeal from the Appellate Court of Illinois judgment to the Supreme Court of Illinois. This was denied without opinion on November 25, 1969.

The Petition at bar follows.

## REASONS FOR GRANTING WRIT

It is completely obvious that the judgment of the Appellate Court of Illinois was reached as the result of a conflict between the justices of that court as to the meaning, interpretation and rationale of language of the Supreme Court of the United States in the case of Gallick v. Baltimore and Ohio Railroad Company, 372 U. S. 108, 83 S. Ct. 659.

The Appellate Court of Illinois stated that their attempt to analyze, compare or reconcile this case with others in the light of the language contained in Gallick v. Baltimore

and Ohio Railroad Company, 372 U. S. 108, 83 S. Ct. 659 and Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S. Ct. 443, would only "further confuse an already chaotic situation."

Mensen cannot conceive that the language of this Court in Gallick v. Baltimore and Ohio Railroad Company, 372 U. S. 108, 83 S. Ct. 659 and in Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S. Ct. 443, created a chaotic mess. This approach to resolve Mensen's rights under the Federal Employers' Liability Act is an unbelievable situation, particularly when the Appellate Court of Illinois went on to say that:

> ". . . **assuming defendant was negligent in permitting a defective inner tube to remain on the truck, the evidence, in our opinion, fails to prove that its negligence caused plaintiff's injury, and**
>
> **"in a philosophic sense the existence of the flat tire may have played a part in producing plaintiff's injury, in that had it not occurred, there might have been no occasion for changing the tire."**

This was and is exactly Mensen's theory in the trial court, which the Appellate Court of Illinois concedes in its opinion, but yet reverses, because it then states that there was no evidence that plaintiff's injury was caused **at all** by defendant's negligence. It is of no consequence that Mensen was injured while changing a tire, or if he had been injured by a highway collision because of a blowout caused by the defective tubes. In each instance an injury would occur because of defective equipment. Yet the App. Ct. of Ill. states that because it was Mensen's duty to change flat tires, there can be no negligence on behalf of the employer by its refusal to furnish reasonably safe equipment.

The opinion of the Appellate Court of Illinois stating that the flat tire may have played a part in producing

plaintiff's injury, prevents a reversal of the verdict under the language of this Court in Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 507, 1 L. Ed. 2d 493, 77 S. Ct. 443, as follows:

> "Judicial appraisal of the proofs (in a Federal Employers' Liability Act case) to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out, whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence."

The Appellate Court of Illinois concedes that there was evidence of negligence, which would prevent reversal; Lavender v. Kurn, 325 U. S. 645, 653, 90 L. Ed. 916, 66 S. Ct. 740.

Additional authority rejected by the Appellate Court of Illinois was: Tennat v. Peoria & P. U. Ry. Co., 321 U. S. 29, 88 L. Ed. 520; Schulz v. Penn. Ry. Co., 350 U. S. 523; Gibson v. Elgin, Joliet & Eastern Ry. Co., 246 Fed. 2d 834.

**Mensen's supervisor knew of a continuing condition likely to cause injury. He, in fact, confirmed this knowledge by his statement after Mensen reported his injury in that he was afraid something like this would happen. We therefore have not only the failure of the employer to furnish reasonably safe equipment, but repeated refusals to so do when it knew the defective equipment made Mensen's job more hazardous.**

Awareness or knowledge that a railroad employee is furnished equipment creating an additional hazard in his

employment or which creates a likelihood of injury, causes liability to exist; Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 78. In fact, the Supreme Court of Illinois stated in Tatham v. Wabash, 412 Ill. 568, 107 N. E. 2d 735, 33 A. L. R. 2d 1287, 1294:

> ". . . The clear and obvious holding of the Lillie case is that when an employer is aware, or should be aware, of conditions creating a likelihood of injury, he has a duty to make provisions against this foreseeable danger, even though the threatened hazard is from the intentional misconduct of third persons."

The opinion of the Appellate Court of Illinois begs the question when it in one instance says that the negligence of the railroad may have played a part in plaintiff's injury, but that there was **no** evidence of negligence that produced plaintiff's injury. What sense do these words make? What sense does such a contradictory opinion make? What guidelines does such a contradictory, majority opinion set up for trial courts to hereafter follow or refuse to follow? Obviously, **NONE.** This opinion does not attempt to solve a chaotic mess, it created one. Only this court can now resolve this situation!

General common law rules of liability, and state practices in respect of the sufficiency of evidence, do not govern cases under the Federal Employers' Liability Act, for the legislation is an avowed departure from the common law—a response to the special needs of railroad workers; Tiller v. Atlantic Coast Line, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967; Sinkler v. Missouri Pacific, 356 U. S. 326, 330, 2 L. Ed. 2d 799, 78 S. Ct. 758; Lavender v. Kurn, 327 U. S. 645, 651, 90 L. Ed. 916, 66 S. Ct. 740. Under the applicable law and facts, the jury had the right to determine if the hazard of Mensen's employment was increased by the refusal of

the employer railroad to remove from use the defective equipment, and the Appellate Court of Illinois had no right to overrule and thrust it aside.

## CONCLUSION

Wherefore, Petitioner prays that this Court issue its writ of certiorari to the Supreme Court of Illinois.

Respectfully submitted

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## APPENDIX A

### Opinion of the Appellate Court for the Fifth Judicial District of Illinois

No. 68-103

In the
Appellate Court of Illinois,
Fifth District

| | |
|---|---|
| Richard B. Mensen, Plaintiff-Appellee, vs. Baltimore & Ohio Railroad Company, a Corporation, Defendant-Appellant. | Appeal from the Circuit Court of St. Clair County. |

Honorable Harold O. Farmer, Judge Presiding.

Goldenhersh, P. J.

Defendant, Baltimore & Ohio Railroad Company, appeals from the judgment of the Circuit Court of St. Clair County entered upon a jury verdict in the amount of $104,250.00.

Plaintiff's complaint, as amended, purporting to state a cause of action based upon the Federal Employers' Liability Act (45 U. S. C. A. 51, et seq.) alleges that plaintiff was employed as a signal maintenance man and while he was changing a tire on a truck used in connection with his work, the truck fell upon him. It charges that defendant was negligent in that it provided, equipped and maintained its truck with faulty or defective tires or tubes, and failed to remove or replace said faulty or defective tires when defendant knew or should have

known "that the same would subject the plaintiff to additional risk and hazard."

Plaintiff's duties required him to test flasher lights and signals in an assigned area and do whatever was necessary to maintain them in working order. He regularly used a truck provided by defendant, was in charge of its maintenance, and could use a credit card to buy gasoline, oil and filters. If tires were needed he was required to contact his supervisor who would issue a requisition for their purchase.

As the result of what plaintiff described as "separations" around the seams of the tubes, tires on the truck became flat on April 5, 1963; in 1964 on February 14, 17, 24, May 26, July 30, September 10, December 4, 5, 16; and in 1965 on January 30 and February 3.

Over a period of time plaintiff made 3 written, and 4 oral requests for new tubes. These requests were directed to R. V. Smith, Signal Supervisor in defendant's shop in Washington, Indiana. Smith, for various reasons declined to authorize the purchase except that on December 10, 1964, he permitted plaintiff to buy two new tubes which he was instructed to put on the front of the truck. On December 16, 1964, plaintiff requested permission to buy two snow tires.

On the morning of February 3, 1965, he had a flat tire. This involved the right rear tire which had previously gone flat, and had been repaired on January 30. He stopped, jacked up the truck and while he was removing the tire, the tire hit the fender of the truck, the truck slipped off the jack, and plaintiff was pushed backwards. There was nothing wrong with the jack, and plaintiff had previously used it four or five times. The tube was repaired that night and continued in use until defendant obtained tubeless snow tires for the truck several days later.

He reported the occurrence to Mr. Smith, who said, "I was scared something like that might happen." Mr. Smith died a year before the trial.

Defendant contends the circuit court erred in denying its motions for directed verdict and judgment n. o. v., and argues there is no evidence that any negligence on its part played any part, even the slightest, in producing plaintiff's injury.

The most recent comprehensive expressions of the Supreme Court with respect to the determination of negligence and causation in cases based on the Federal Employers' Liability Act are stated in Gallick v. Baltimore and Ohio Railroad Company, 372 U. S. 108, 83 S. Ct. 659; and Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S. Ct. 443. The Act does not, however, make the employer an insurer against injuries suffered by its employees, Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413; Inman v. Baltimore & Ohio Railroad Co., 361 U. S. 138, 80 S. Ct. 242; and to hold the employer liable it is necessary that there be evidence that his negligence played a part in causing the employee's injury. New York, N. H. & H. R. Co. v. Henagan, 364 U. S. 441, 81 S. Ct. 198.

We have examined the many cases cited by counsel and those collected in notes found at 98 A. L. R. 2d 653, 30 A. L. R. 2d 1192, and in the annotations to 45 U. S. C. A. 51. Any attempt at analysis, comparison, or reconciliation, would serve only to further confuse an already chaotic situation.

In this case, assuming defendant was negligent in permitting a defective inner tube to remain on the truck, the evidence, in our opinion, fails to prove that its negligence caused plaintiff's injury. Nicholson v. Erie R. R., 253 F. 2d 939 (CA—2); Dessi v. Pennsylvania R. R., 251 F. 2d 149 (CA—3); Simpson v. Texas & New Orleans R. R., 297 F. 2d 660 (CA—5).

The performance of his duties required plaintiff to maintain the truck, including the changing of tires. It is not contended that defendant failed to furnish him with the tools necessary to change the tire, and the most the evidence shows is that he may have been required to perform the particular task more often than if the tires were perfect, or that "but for" defendant's negligence plaintiff would not have been injured.

In a philosophic sense the existence of the flat tire may have played a part in producing plaintiff's injury in that had it not occurred, there might have been no occasion for changing the tire. What occurred here, however, could as well have happened while plaintiff was mounting a new tire furnished in compliance with his request, or in a routine rotation or replacement of tires.

We have examined the record and hold that the evidence was insufficient to take to the jury the question of whether defendant's negligence played a part in causing plaintiff's injury.

Because of the conclusion reached, it is not necessary to consider defendant's remaining claims of error.

For the reasons stated the judgment of the Circuit Court of St. Clair County is reversed.

Judgment Reversed.

Concur: Edward C. Eberspacher

Concur: .....

PUBLISH IN FULL

Filed
August 7, 1969
Walter T. Simmons
Fifth District of Illinois
Clerk Pro-Tempore Appellate Court

## APPENDIX B

**Dissenting Opinion of the Appellate Court for the Fifth Judicial District of Illinois**

No. 68-103

In the
Appellate Court of Illinois,
Fifth District

Richard B. Mensen,
Plaintiff-Appellee,
vs.
Baltimore & Ohio Railroad Company, a Corporation,
Defendant-Appellant.

Appeal From the Circuit Court of St. Clair County

Honorable Harold O. Farmer, Judge Presiding.

George J. Moran, J., Dissenting:

In my opinion the judgment of the Circuit Court of St. Clair County in this case should be affirmed under the rationale of Gallick v. Baltimore and Ohio Railroad Company, 372 U. S. 108, 83 S. Ct. 659.

PUBLISH IN FULL

Filed
August 7, 1969
Walter T. Simmons
Fifth District of Illinois
Clerk Pro-Tempore Appellate Court

## APPENDIX C

In the Supreme Court of Illinois

Richard B. Mensen,
Petitioner,

vs.

Baltimore & Ohio Railroad Company,
a Corporation,
Respondent.

No. 42563

Petition for Leave to Appeal was: **DENIED.**

Filed
November 25, 1969
Justin Taft
Clerk of the Supreme Court